

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

Woods
P.L.
30948

FILE: B-218348.2

DATE: April 11, 1984

MATTER OF: Woodward Associates, Inc.--
Reconsideration

DIGEST:

Prior decision is affirmed where no material error of law or fact is shown.

Woodward Associates, Inc. requests reconsideration of our decision, Woodward Associates, Inc.; Monterey Technologies, Inc., B-216714 et al., March 5, 1985, 85-1 CPD ¶ _____, in which we sustained two protests involving the award of a contract by the Bureau of Mines, Department of the Interior, to Monterey Technologies, Inc., under request for proposals No. J0145034. We affirm our decision.

In our prior decision, we sustained Woodward's protest because the agency improperly had accepted a late modification of Monterey's proposal which displaced Woodward as the low offeror. Rather than recommending an award to Woodward, however, we recommended that the agency reopen discussions with both offerors. The reason for our recommendation was that it appeared that the agency inadvertently may have misled Monterey concerning its opportunity to revise its proposal in response to a request for best and final offers. Monterey had raised this issue both as an interested party to Woodward's protest and later in a protest it filed with this Office. In addressing this point, we noted that Monterey and the agency disagreed on whether the agency had requested in a telephone call on August 29, 1984, that Monterey submit a revised best and final offer. Monterey's version of the call was that the agency merely had requested confirmation of its existing best and final offer. Since the record did not contain a contemporaneous memorandum concerning the call, nor was there any written confirmation of the request for new best

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and final offers, we could not conclude that Monterey had had an equal opportunity to compete. Therefore, we sustained Monterey's protest.

In requesting reconsideration, Woodward says we should not have considered Monterey's protest because it was not timely filed. Woodward contends that Monterey knew the basis for its protest at the latest when it received the agency's report on Woodward's protest in November 1984. Woodward notes that Monterey did not file its protest until January 1985, well after the 10-day filing period prescribed in our Bid Protest Procedures, 4 C.F.R. § 21.2(b)(2) (1984). Woodward complains further that it did not receive a copy of Monterey's protest and argues that our decision would have been different had it had the opportunity to comment on that protest. Finally, Woodward contends that the agency did ask Monterey on August 29 to submit a new best and final offer and says it is inconceivable that no document exists to prove this. Woodward says that Monterey's president is experienced in government contracting and should not be heard to say that he did not understand the agency's request for a revised best and final offer.

We agree with Woodward that Monterey's protest was untimely and concede that perhaps it should have been dismissed as such. Our failure to do so was not significant, however, since the dispositions and the recommendation in our prior decision were based primarily on the record as developed in Woodward's protest. Specifically, our concern that Monterey may not have had a fair opportunity to compete derived exclusively from the factual assertions made by Monterey in its comments on Woodward's protest. The fact that Monterey later filed an untimely protest premised on and incorporating the same factual assertions did not, in our view, detract from the legitimacy of its position or prevent us from fashioning a remedy in Woodward's protest that we believed would be fair. See Redifon Computers Limited--Reconsideration, B-186691, June 30, 1977, 77-1 CPD ¶ 463. In short, since neither the filing by Monterey of an untimely protest, nor our action in sustaining that protest, materially affected the essential result in our prior decision, we see no reason to reverse or modify our prior decision.

With regard to Woodward's arguments concerning its failure to receive a copy of Monterey's protest, we are not convinced that Woodward was prejudiced by this fact. As noted above, Monterey's protest incorporated the same assertions it earlier had made in commenting on Woodward's protest. Monterey provided a copy of these comments to Woodward. In addition, subsequent to our decision of March 5, we provided Woodward with a copy of Monterey's protest. Even though the firm now has had full access to all of Monterey's submissions, Woodward's current rebuttal merely restates the agency's version of the August 29 telephone conversation and questions Monterey's contrary version. As indicated in our prior decision, however, we could not determine exactly what was said during that conversation, and now having the comments of one not a party to that conversation, we are no better able to do so.

Finally, Woodward contends that the agency must have some written record concerning the substance of the telephone call. We have been advised informally by the agency, however, that a search of their records in this matter produced no such document.

Since Woodward has not shown that our prior decision contained an error of law or fact that would require reversal or modification, we affirm our prior decision.

for *Larry R. Van Cleave*
Comptroller General
of the United States